The Attorney General of the United States had advised Mr. Laird, in an opinion dated Jan. 3, 1969, that article I, section 6, clause 2 of the Constitution did not prohibit the appointment of a legislator to an office when at the time of his appointment it was possible but not certain that a proposed salary increase for that office could receive final approval at a future date.[8]

§ 13.7 In the 93d Congress, a bill was passed decreasing the salary for the position of Attorney General of the United States, in order that Senator could be nominated to the position without violating article I, section 6, clause 2 of the United States Constitution.

On Dec. 10, 1973, the President signed into law Public Law 93–178, 87 Stat. 697, which read in part as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the compensation and other emoluments attached to the Office of Attorney General shall be those which were in effect on January 1, 1969, notwithstanding the provisions of the salary recommendations for 1969 increases transmitted to the Congress on January 15, 1969, and notwithstanding any other provision of law, or provision which has the force and effect of law, which is enacted or becomes effective during the period from noon, January 3, 1969, through noon, January 2, 1975.[9]

The decrease in the salary for Attorney General was necessary in order to avoid violating article I, section 6, clause 2 of the Constitution, which provides that no Senator or Representative shall, during the time for which elected, be appointed to a civil office, the emoluments of which shall have been increased during such time. The President had nominated Senator William B. Saxbe, of Ohio, as Attorney General, and the salary for the position had been increased during his term as a Senator.

§ 14. —Military Service

Early Congresses determined that active duty with the United States Armed Forces was incompatible with congressional membership.[10] On many occasions, the House has declared or assumed vacant the seats of Members who have accepted officers' commissions in branches of the

8. See 42 Op. Atty Gen. 36.

9. 119 CONG. REC. 40266, 93d Cong. 1st Sess., Dec. 7, 1973.

10. See 1 Hinds' Precedents §§ 486–492, 494, 500, 504.

armed forces.(11) The practice has not, however, been uniform, and on some occasions involving the military service of Members the House has taken no action.(12)

During and immediately prior to World War II, the House permitted Members to hold officers' commissions, to attend training while the House was in session, and to be absent from House proceedings for military duties.(13) But when the President during the war took action to compel congressional Members to make an election between serving in the Congress and serving in the military,(14) some Members returned to the House and others resigned or otherwise left Congress in order to serve in the armed forces.(15) Congressional salary was not paid to those Members absent during World War II for military service.(16)

An unresolved issue relating to incompatible offices and military service is the status of Members of Congress who hold reserve commissions in branches of the armed forces. Congress has declined on several occasions to finally determine whether active service with the reserves is an incompatible office under the United States.(17) In 1965, however, the Department of Defense stripped all Members of Congress and some congressional employees of their active reserve status.(18)

Service in Armed Forces Reserves

§ 14.1 A Senate resolution introduced in the 88th Con-

11. See, for example, 1 Hinds' Precedents §§ 486, 488, 490.

12. 40 Op. Att'y Gen. 301 (1943). "Under the practice which has long prevailed, Members of Congress may enter the Armed Forces by enlistment, commission, or otherwise but thereupon cease to be Members of Congress provided the House or the Senate, as the case may be, chooses to act."

13. See §§ 14.4, 14.5, infra.

14. See § 14.3, infra.

15. See § 14.6, infra.

16. See § 14.7, infra.

Subsequent to World War I, the House passed a resolution authorizing the back-payment of salaries to Members who had been absent for military service (see 6 Cannon's Precedents § 61).

17. See § 14.1, infra, and 6 Cannon's Precedents §§ 60–62.

18. See § 14.2, infra.

Where a federal court held that a Member of Congress could not hold a commission in the armed forces reserve under art. I, § 6, clause 2, the Supreme Court reversed on grounds relating to the plaintiff's lack of standing to maintain the suit. *Reservists' Committee to Stop the War* v *Laird*, 323 F Supp 833 (1972), aff'd 595 F2d 1075 (1972), rev'd on other grounds 418 U.S. 208 (1974).

gress, to effectuate an inquiry into the possible incompatibility between serving simultaneously in the armed forces reserves and in the Congress, was not acted upon by committee or by the full Senate.

On May 15, 1963, Senator Barry Goldwater, of Arizona, introduced Senate Resolution No. 142, "to make inquiry whether the holding by a Member of the Senate of a Commission as a Reserve member of any of the armed forces is incompatible with his office as Senator"; the resolution was referred to the Committee on the Judiciary.[19] Senator Goldwater introduced the resolution in order to have the Congress finally settle an issue which had never been determined.[20]

On July 24, 1963, Senator Goldwater arose to state that the Committee on the Judiciary had yet failed to take any action on the resolution.[1] He stated that since the committee was failing to act, he was independently investigating the issue, with the conclusion that reserve commissions were not incompatible offices. He reviewed the legislative history of an Act of July 1, 1930, which he said supported his view that service in the reserves was not incompatible with service as a Senator.

§ 14.2 A Senator proposed and then withdrew an amendment in the 89th Congress to block a Defense Department order which deactivated Congressmen then serving in the active reserves.

On Apr. 6, 1965, during Senate debate on a military procurement authorization bill, Senator Howard W. Cannon, of Nevada, offered an amendment to counteract a Department of Defense directive of Jan. 16, 1965, No. 1200.7, which had ordered all Members of Congress out of the Active Reserve and into the Standby or Retired Reserve.[2]

Senator Cannon stated the reason for his amendment as follows:

> With reference to Members of the legislative branch who also may be

19. 109 CONG. REC. 8764, 88th Cong. 1st Sess.

20. See Senator Goldwater's explanation of the resolution and analysis of historical developments at 109 CONG. REC. 8715–18, 88th Cong. 1st Sess., May 15, 1963.

The resolution was amended on May 15 to include studying the incompatibility of a Senator serving on the United Nations delegation. 109 CONG. REC. 8843.

1. 109 CONG. REC. 13211, 88th Cong. 1st Sess.

2. 111 CONG. REC. 7097, 89th Cong. 1st Sess.

> members or former members of the Ready Reserve, their requirements for military service should be the subject of a Presidential determination, as they were in World War II. The premise underlying the Defense Department order is in error; namely, that a Member of the Senate or the House of Representatives . . . is unfit not only to serve in the Ready Reserve, but also to decide for himself whether he can best serve his country at a time of national crisis as a legislator or as a member of the Armed Forces on active duty.

Senator Cannon later withdrew his amendment, upon assurance his objection would be considered by the committee handling the bill.[3]

Action of Executive Branch

§ 14.3 During World War II, the President recalled to Congress Members then serving in the armed forces, after the Department of War and the Department of the Navy stated their opposition to such simultaneous service.

On June 1, 1942,[4] there were inserted in the Record letters written by Secretary of War, Henry I. Stimpson, and Secretary of the Navy, Frank Knox, addressed to the Speaker of the House, opposing the enlistment or commissioning of Members of Congress in the armed forces and stating that a Member of Congress could render greater services to the Nation by continuing to represent the people rather than by serving with the armed forces.

The letters stated that activation of Members who held reserve commissions would be discouraged, and applications for enlistment by Members would be disapproved.

During 1942, the President began recalling to Congress those Members presently absent on active military service.[5]

In 1943, the Attorney General advised the President as follows:

> It would be a sound and reasonable policy for the Executive Department to refrain from commissioning or otherwise utilizing the services of Members of Congress in the armed forces, and the Congress by exemptions in the Selective Training and Service Act of 1940 has recognized the soundness of this policy.[6]

3. *Id.* at p. 7101.

4. 88 CONG. REC. A–2015, 77th Cong. 2d Sess.

5. See, for example, the remarks of Mr. Albert L. Vreeland (N.J.) on July 30, 1942, 88 CONG. REC. A–2993, 77th Cong. 2d Sess.

6. 40 Op. Att'y Gen. 301 (1943). The opinion stated that both the House and the Senate had, on some occasions in the past, determined that service with the armed forces was incompatible with congressional membership.

World War II Service

§ 14.4 During and immediately prior to World War II, Members were allowed to hold officers' commissions and to attend military training while the House was in session.

On June 10, 1941,[7] the House granted a leave of absence to Mr. James G. Scrugham, of Nevada, presently a lieutenant colonel in the Officers Reserve Corps, to attend three weeks of military training.

Similarly, on Oct. 23, 1941,[8] the House granted by unanimous consent indefinite leave of absence to Mr. Dave E. Satterfield, Jr., of Virginia, for temporary active duty as an officer in the Naval Reserve.

§ 14.5 During World War II, no objections were voiced to the absence of Members-elect and to the delay in their taking the oath because of overseas duty with the armed forces.

On Jan. 4, 1945,[9] an announcement was made that Mr. Henry J. Latham, of New York, would be delayed in taking the oath until the month of February, since he was presently a lieutenant in the Navy and on duty in the South Pacific. No objection was raised in the House to Mr. Latham's absence.

On Mar. 7, 1945,[10] Mr. Albert A. Gore, of Tennessee, appeared to take the oath of office in the 79th Congress. He had been re-elected to the 79th Congress after resigning his seat in the 78th Congress in order to serve overseas with the armed forces.

§ 14.6 During World War II, after the executive branch had voiced opposition to the simultaneous military service of Members of Congress, some Members resigned their seats, or did not seek re-election, in order to serve with the armed forces.[11]

For the statutory draft deferment of Congressmen referred to, see Selective Training and Service Act of 1940, 54 Stat. 885, Ch. 720, § 5(c)(1).

7. 87 CONG. REC. 4991, 77th Cong. 1st Sess.

8. 87 CONG. REC. 8210, 77th Cong. 1st Sess.

9. 91 CONG. REC. 34, 79th Cong. 1st Sess.

10. 91 CONG. REC. 1859, 79th Cong. 1st Sess.

11. According to Senator Howard W. Cannon (Nev.) in remarks on Apr. 6, 1965, of the 20 Members of Congress who had gone on active duty during World War II before the President determined they should be recalled, 12 either resigned or otherwise left

During World War II, the Departments of the War and Navy stated their opposition to Members of Congress serving in the military, and the President began recalling to Congress Members who were commissioned or had enlisted.(12)

Some Members who were then in the armed services, and some who wished to join, then resigned from the House or did not seek reelection, in order to serve with the armed forces.(13)

§ 14.7 During World War II, the Sergeant at Arms of the House did not disburse compensation to those Members who were presently on leaves of absence and serving in the military.

In accordance with an opinion given him by the Comptroller General, Kenneth Romney, Sergeant at Arms of the House, did not pay congressional salary to those Members of the House who were during World War II on leaves of absence because of service in the Army and Navy.(14)

---

the House in order to serve. 111 CONG. REC. 7097, 89th Cong. 1st Sess.

12. See § 14.3, supra.

13. See 90 CONG. REC. 8990, 78th Cong. 2d Sess., Dec. 7, 1944; 90 CONG. REC. 8450, 78th Cong. 2d Sess., Nov. 27, 1944; 90 CONG. REC. 8201, 78th Cong. 2d Sess., Nov. 20, 1944; 89 CONG. REC. 8163, 78th Cong. 1st Sess., Nov. 14, 1943; 89 CONG. REC. 7779, 78th Cong. 1st Sess., Sept. 23, 1943; and 88 CONG. REC. 7051, 77th Cong. 2d Sess., Sept. 7, 1942.

14. See H. REPT. NO. 2037, from the Committee on House Accounts, to accompany H. Res. 512, 79th Cong. 2d Sess.